Compromises might be suggested. Refusal to retract, in those jurisdictions where negligence does not, of itself, defeat a qualified privilege, might forfeit the immunity only when the original report was negligently made. One who refuses to retract might be held liable for such damages only as could be shown to flow from that refusal. On the other hand, one might be held to refuse on peril of later proof of the falsity of his statements. And he might be rigidly required to make his retraction full, as public as the original statement, and before action. On the whole, however, the position that refusal to make a reasonable retraction destroys the immunity of a conditional privilege seems the most satisfactory, whether it be embodied in decision or statute.[20]

THE EFFECT OF NOTICE TO THE BUYER OF INTENDED RESALE BY AN UNPAID SELLER. — The right of an unpaid seller having a lien on the goods to resell them is well established in this country.[1] It is generally held that notice of intention to resell is not essential,[2] and the authorities agree that there need not be notice of the time and place of resale.[3] By the prevailing view, the one requisite to the validity of the resale is that it be made at such a time and place and in such a manner as to afford reasonable protection to the interests of the defaulting buyer.[4] If the seller fulfills this requirement, he may recover from the buyer the difference between the resale price and the original contract price.[5]

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[20] Such a law would, in effect, impose a new liability for failure to act. On this point, see James Barr Ames, "Law and Morals," 22 HARV. L. REV. 97, 111–113.

As to when a retraction may reasonably be demanded, see the citations in note 14, *supra*.

One of the advantages of narrowing the definition of conditional privilege by making it defeasible by refusal to retract or negligence is that a ground is thus afforded for enlarging its scope to include some of the cases which are otherwise treated as gossip, and governed by the harsh law of absolute liability. Under the proposed rule, the family minister, doctor, or lawyer, or anyone in the position of family adviser, might safely enjoy a conditional privilege in making a communication to a girl as to the character of her suitor. *Cf.* Joannes *v.* Bennett, 5 Allen (Mass.) 169 (1862). One who without negligence makes a report under a reasonable but mistaken belief in the existence of circumstances which would make his statements privileged might well be afforded similar protection. *Cf.* Hebditch *v.* MacIlwaine, [1894] 2 Q. B. 54. See 8 HARV. L. REV. 235. *Cf.* also Macintosh *v.* Dun, *supra*.

[1] See WILLISTON, SALES, c. 16; BURDICK, SALES, 3 ed., 289; 2 MECHEM, SALES, §§ 1621 *et seq.*

[2] See Wrigley *v.* Cornelius, 162 Ill. 92, 44 N. E. 406 (1896); Van Brocklen *v.* Smeallie, 140 N. Y. 70, 75, 35 N. E. 415, 416 (1893). *Cf.* Pratt *v.* Freeman Co., 115 Wis. 648, 92 N. W. 368 (1902). *Contra*, Dill v. Mumford, 19 Ind. App. 609, 49 N. E. 861 (1898). See WILLISTON, SALES, § 548; 2 MECHEM, SALES, §§ 1633–1636.

[3] Woodward *v.* Tyng, 123 Md. 98, 91 Atl. 166 (1914). *Cf.* Walker *v.* Gateway Milling Co., 121 Va. 217, 92 S. E. 826 (1917). See WILLISTON, SALES, § 549.

[4] Clore *v.* Robinson, 100 Ky. 402, 38 S. W. 687 (1897). See Morris *v.* Wibaux, 159 Ill. 627, 646, 43 N. E. 837, 842 (1896). *Cf.* Ackerman *v.* Rubens, 167 N. Y. 405, 60 N. E. 750 (1901). See WILLISTON, SALES, § 547.

[5] Dustan *v.* McAndrew, 44 N. Y. 72 (1870); Van Brocklen *v.* Smeallie, 140 N. Y. 70, 35 N. E. 415 (1893); Bowden *v.* Southern, etc. Co., 206 S. W. 124 (Tex. Civ. App., 1918). See 2 MECHEM, SALES, § 1643. The seller may keep any profits from the resale. Bridgford *v.* Crocker, 60 N. Y. 627 (1875). See UNIFORM SALES ACT, § 60 (1); WILLISTON, SALES, § 553.

Although notice to the buyer of intention to resell and of the time, place, and terms of the resale is not essential, such notice or its absence may be relevant on any issue involving the reasonableness of the duration of the buyer's default [6] or the fairness of the resale.[7] A recent decision [8] attributes greater significance to the giving of notice, by holding that the buyer's failure to object before the resale, precludes him thereafter from asserting, as a defense to an action by the seller, that the resale was not made in the exercise of "reasonable care and judgment." [9]

The question thus presented would seem an important one commercially, but there is a striking absence of authority upon it.[10] *Pride* v. *Marshall* [11] bids fair to become a leading case. The seller gave four days notice of the time, place, and terms of resale. The buyer neither consented nor objected thereto. The sale was held, and the seller sued the buyer for the difference between the contract and resale prices. The buyer contended for his defense that the terms of the resale were unreasonable, that it was not reasonably advertised, and that a better price could have been secured in the Middle West than in Boston, the place where the resale was made.

Since the remedy of reselling the buyer's goods is a privilege conferred by the law upon the unpaid seller, that party, to have the benefit thereof, must exercise this privilege reasonably,[12] and must prove that he did so.[13] Logically, the buyer may deny this reasonableness, unless

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The Uniform Sales Act codifies the law as to the seller's rights thus far stated. See UNIFORM SALES ACT, § 60; MASS. GENL. LAWS, c. 106, § 49.

[6] See UNIFORM SALES ACT, § 60 (3). See VanBrocklen *v.* Smeallie, *supra*, at 75. See WILLISTON, SALES, § 548. As to whether the reasonableness of resale is a question of fact or of law, see Woodward *v.* Tyng, 123 Md. 98, 113, 91 Atl. 166, 167 (1914); Morris *v.* Wibaux, 159 Ill. 627, 645, 43 N. E. 837, 842 (1896).

[7] See WILLISTON, SALES, § 548; 2 SEDGWICK, DAMAGES, 9 ed., § 755.

[8] Pride *v.* Marshall, 131 N. E. 183 (Mass., 1921). For the facts of this case see RECENT CASES, *infra*, p. 887.

[9] See UNIFORM SALES ACT, § 60 (5). See also note 4, *supra*.

[10] The only other expression of opinion which could be found upon the point is a strong *dictum contra* in West *v.* Cunningham, 9 Port. (Ala.) 104, 108 (1839). Mendel *v.* Miller, 126 Ga. 834, 56 S. E. 88 (1906), sometimes cited to the same effect, is distinguishable. In the case of resale by an unpaid pledgee, the Massachusetts court has held that failure to object to the place of resale after notice thereof precludes the pledgor from asserting its unreasonableness. Guinzburg *v.* Downs Co., 165 Mass. 467, 43 N. E. 195 (1896). This seems to be the only decision so holding, and an unlimited application of its principle may not be desirable. In Pride *v.* Marshall, the court was apparently impressed by the analogy between the cases. As to the similarity in the positions of an unpaid seller and an unpaid pledgee, see Madison *v.* Weyl-Zuckerman, 60 Cal. Dec. 743, 192 Pac. 110 (1920); Tuthill *v.* Skidmore, 124 N. Y. 148, 154, 26 N. E. 348, 349 (1891). In general, the unpaid seller stands in the better position. For example, he may keep any profits from the resale (see note 5, *supra*), and he may at the resale buy in the goods himself. Ackerman *v.* Rubens, *supra*.

[11] See note 8, *supra*.

[12] See UNIFORM SALES ACT, § 60 (5). It is often suggested that the seller acts as the buyer's agent in making the resale. This is not true. It is a power given by the law. See Moore *v.* Potter, 155 N. Y. 481, 487, 50 N. E. 271, 272 (1898). See WILLISTON, SALES, § 553; 2 MECHEM, SALES, § 1629.

[13] Thayer Lumber Co. *v.* Naylor, 100 Miss. 841, 57 So. 227 (1911); Brownlee *v.* Bolton, 44 Mich. 218, 6 N. W. 657 (1880). *Cf.* Wisconsin, etc. Lumber Co. *v.* Buschow Lumber Co., 236 S. W. 410 (Mo. App., 1922).

he has estopped himself from so doing. This he can do only by giving the seller reason to believe that he acquiesces in what is being done.[14] On the other hand, the result of *Pride* v. *Marshall* achieves a certainty which may go far to offset logical difficulties in reaching it. It insures that the seller may know just where he stands, and avoids troublesome inquiries into the buyer's state of mind. The effect of notice on the buyer's right to assert unreasonableness must, therefore, be decided with two considerations in mind: (1) the possibility of working out an estoppel; and (2) the commercial need of certainty.

First, as to the terms of resale, the buyer had notice, and if any of them were unreasonable, he must have known it at that time. It works no hardship in such a case to require prompt remonstrance; and to hold *contra* would render the position of the seller less certain than is commercially desirable. He may reasonably consider that the buyer acquiesces to these terms by his silence. It is submitted that the decision is sound in protecting him when he acts accordingly.

The buyer's second objection was to the amount and kind of advertising. He had no notice as to either. This decision requires the buyer to inform himself at his peril, and puts the burden of seeing that the resale is reasonable in this respect squarely upon him. It is not a very great burden, however, for complete information can be had upon inquiry from the seller.[15] Failure to take this simple step may reasonably be interpreted by the latter as a representation of acquiescence in whatever is being done; and when the seller is thus "lulled into security," [16] and acts accordingly, it is arguable that the buyer is estopped from asserting unreasonableness.[17] The result thus reached seems to accord with the requirements of business convenience.

The third objection, as to the place of resale, presents a still different problem. The buyer had notice of the place, but asserted that he did not know enough collateral facts to judge of its reasonableness.[18] The

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[14] In Guinzburg *v.* Downs Co., note 10, *supra*, the court said that silence after notice is a waiver of the right to object. "Waiver" is a slippery term; it seems better, if a true estoppel cannot be worked out, to place the decision frankly upon grounds of practicability or commercial convenience. See 2 WILLISTON, CONTRACTS, § 679.

[15] The seller's refusal to tell what advertising is being done would ordinarily foreclose him from asserting either estoppel or commercial need for his own protection, and would be evidence of unreasonableness and bad faith.

[16] See EWART, ESTOPPEL, 40, 133.

[17] A close analogy is found in the case where failure, during the erection of a house, to make inquiry as to the exact property line was held to estop an adjoining owner from asserting that the house extended upon his land. Greene *v.* Smith, 57 Vt. 268 (1884). It has often been held that where a man stands by and knowingly allows his property to be sold, without remonstrance, to one who buys under an erroneous impression of title, he is estopped from later asserting that the seller did not have authority to sell it. Chapman *v.* Pingree, 67 Me. 198, 202 (1877); Pickard *v.* Sears, 6 Ad. & E. 469 (1837). See Trenton Banking Co. *v.* Duncan, 86 N. Y. 221, 228 (1881). See BIGELOW, ESTOPPEL, 6 ed., 603, 648 *et seq.*

[18] The market in the Middle West was better than that in the East, and the seller, a national organization, was alleged to have known that fact. The buyer, a local dealer, claimed that he himself did not know it. The opinion assumes the contrary, and upon that interpretation the situation is similar to that discussed under the buyer's first objection, *supra*, and the decision upon it is clearly right. It is, furthermore, doubtful if the seller would have been obliged to take the goods to the

seller could not be expected to give data as to widespread market conditions, and in many cases would not himself have such knowledge. Inquiry from him would probably be fruitless. It savors of refinement to say that failure to make such an inquiry, predestined to be unavailing, is a representation of complete approval as to the place of resale. On the other hand, the seller has given all the information that he could reasonably be expected to volunteer; and if he acts in good faith, the interests of the mercantile community may demand his protection strongly enough to warrant the resulting curtailment of the buyer's rights. This result is less harsh in view of the fact that, after all, it was the buyer's own default that created the necessity for the resale.

THE RESPONSIBILITY OF AN INVOLUNTARY BAILEE. — When goods are thrust unexpectedly upon one under circumstances which make it impossible for him to decide whether or not he will take them into his possession, what is his responsibility toward them? The cases involving the point are not common, but the frequency with which such a bailee is made the object of a fraud urges a clear determination of his status. Story early styled him an "involuntary bailee," [1] and intimated that he would have the same obligation of care toward the article while in his custody as a finder.[2] Later text-writers have assimilated the position of the two without further discussion.[3] The finder has in turn been rightly assimilated to the gratuitous, voluntary bailee.[4] The responsibilities of the latter include the exercise of at least slight diligence in the custody of the article, with a duty to redeliver to the bailor.[5] A misdelivery by such a bailee, though fraudulently procured and made without negligence on his part, is a conversion.[6] But is an involuntary

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Middle West to sell them had the buyer requested it. *Cf.* Ginn *v.* Coal Co., 143 Mich. 84, 106 N. W. 867 (1906). It is a matter of degree. Had the better market been less distant, reasonable care on the seller's part might have demanded that he seek that market, and failure to do so would be evidence of bad faith. See Anderson *v.* Frank, 45 Mo. App. 482, 487 (1891).

[1] See STORY, BAILMENTS, 4 ed., §§ 44a, 83a. (The fourth edition was the last to receive the personal supervision of Mr. Justice Story.)

[2] See § 83a. The learned author, it should be noted, was referring only to the care required in protecting the article, and not to the responsibility respecting a delivery.

[3] See HALE, BAILMENTS AND CARRIERS, 44; DOBIE, BAILMENTS AND CARRIERS, 52.

[4] Burns *v.* State, 145 Wis. 373, 128 N. W. 987 (1910); Dougherty *v.* Posegate, 3 Iowa 88 (1856). See Smith *v.* N. & L. R. R., 27 N. H. 86, 90 (1853). *Cf.* Cox *v.* Rixon, 50 L. T. 222 (1871). See also 50 L. T. 233.

The finder is under no obligation to assume possession of the article, economically advisable as it might be to do so. Consequently, when he does take it into his possession, he voluntarily undertakes the duties of a depositary. In jurisdictions where finders have a statutory lien, they are like bailees for hire. See Smith *v.* N. & L. R. R., *supra*, at 91. See HALE, *op. cit.*, 43; VAN ZILE, BAILMENTS AND CARRIERS, 2 ed., § 89.

[5] First judicially enunciated in Coggs *v.* Bernard, 2 Ld. Ray. 909, 914, 920 (1703). See Joseph H. Beale, Jr., "Gratuitous Undertakings," 5 HARV. L. REV. 222, 228. See also cases cited in note 6, *infra*.

[6] Jenkins *v.* Bacon, 111 Mass. 373 (1873); Rubin *v.* Huhn, 229 Mass. 126, 118 N. E. 290 (1918); Hicks *v.* Lyle, 46 Mich. 488, 9 N. W. 529 (1881); Hubbell *v.* Blandy,